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No. 83-180

In the Supreme Court of the United States

OCTOBER TERM, 1983

SOUTHERN PACIFIC TRANSPORTATION COMPANY, PETITIONER

v.

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL.

and

WALKER RIVER PAIUTE TRIBE OF NEVADA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Secretary of the Interior may lawfully require by regulation that a railroad obtain the consent of an Indian tribe before applying for a right-of-way across tribal lands pursuant to the Act of Mar. 2, 1899, 25 U.S.C. 312 *et seq.*

2. Whether, assuming that the consent requirement is consistent with the 1899 Act, the provision granting rule-making authority to the Secretary exceeded Congress's power to delegate its legislative authority.

3. Whether the Secretary's imposition of a tribal consent requirement constituted an impermissible subdelegation of power to the Indian tribe.

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OPINIONS BELOW

The opinion of the court of appeals (Supp. App. A1, at 1)[1] is reported at 700 F.2d 550. The opinion of the district court (Supp. App. B3, at 1) is not reported. The final decision of the Department of the Interior (Supp. App. B2, at 1) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1983. A petition for rehearing was denied on June 9, 1983 (Pet. App. C3, at x). The petition for a writ of

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[1]Certain materials in the appendix to the petition have been reproduced in a separate volume, cited herein as "Supp. App."

certiorari was filed on July 12, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Act of Mar. 2, 1899, 25 U.S.C. 312 *et seq.*, is set forth at Pet. App. D4 at xiv. The General Rights-of-Way Act of 1948, 25 U.S.C. 323 *et seq.*, is set forth at Pet. App. D5, at xv.

STATEMENT

1. Petitioner operates a railway in the western United States, a portion of which runs through Reservation lands held by the United States in trust for the benefit of respondent Walker River Paiute Tribe of Nevada. *United States* v. *Southern Pacific Transportation Co.*, 543 F.2d 676 (9th Cir. 1976). Petitioner and its predecessors have operated the line through the Reservation continuously since 1882, and indeed, until 1976, petitioner assumed that it had acquired, sometime during the nineteenth century, a valid easement for its railway and adjoining telephone and telegraph lines. In 1976, however, the Ninth Circuit held that petitioner had failed to acquire necessary congressional approval either directly through a special Act or indirectly by complying fully with an 1899 Act, which permits railroads to obtain rights-of-way across Indian lands. 543 F.2d at 685, 690-691. Accordingly, the court held that with regard to a 10.89 mile stretch of railway, petitioner was a trespasser on the Tribe's land. 543 F.2d at 699.

On April 28, 1977, petitioner filed an application, pursuant to the Act of March 2, 1899, 25 U.S.C. 312 *et seq.* ("1899 Act"), with the local office of the Department of the Interior's Bureau of Indian Affairs, seeking a right-of-way for its railway and telephone and telegraph line over the 10.89 miles on which the court of appeals had held petitioner was a trespasser (Pet. App. A1, at 552). On May 4, 1977, the Agency Superintendent returned the application without

filing it because, inter alia, petitioner had failed to include evidence that the Tribe had consented to the right-of-way as required by 25 C.F.R. 161.3(a) (1981) (Supp. App. A1, at 10, 12).[2] Petitioner sought administrative review by both the Department's Assistant Area Director in Phoenix and the Assistant Secretary for Indian Affairs. Both upheld the decision not to file the application without the Tribe's consent; the latter action constituting the Department's final decision (Supp. App. B2, at iii).

2. Petitioner then filed the instant suit in the United States District Court for the District of Nevada, seeking declaratory relief and an injunction requiring the Secretary to file, process and approve petitioner's right-of-way application without the Tribe's consent. The district court granted petitioner's motion for summary judgment, holding alternatively that the 1899 Act constituted (1) an in praesenti grant of a right-of-way to any railroad company that satisfied the *statutory* conditions for obtaining the grant or (2) a grant to such companies of the power of eminent domain. Supp. App. B3, at 12-17. The court held that the Department's requirement that petitioner obtain tribal consent was inconsistent with either reading of the 1899 Act and therefore was beyond the power of the Secretary to impose (Supp. App. B3, at 13, 17, 20, 21). The district court entered judgment requiring the Secretary to file and process the right-of-way application under the 1899 Act, notwithstanding the lack of consent by the Tribe (Supp. App. B4, at v).

The court of appeals reversed (Supp. App. A1, at 550-556). It held that the Secretary's regulation requiring tribal consent was permissible under the 1899 Act. It pointed out

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[2] 25 C.F.R. 161.3(a) (1981) provides:

> No right-of-way shall be granted over and across any tribal land, nor shall any permission to survey be issued with respect to any such lands, without the prior written consent of the tribe.

that the Act expressly granted rulemaking authority to the Secretary and that the legislative history indicated that the Act was intended fully to protect Indian interests. Pet. App. A1, at 552-553. Accordingly, the court concluded that the tribal consent requirement was a reasonable exercise of the Secretary's properly delegated authority under the 1899 Act.[3] The court of appeals also found support for its conclusion in the General Rights of Way Act of 1948, 25 U.S.C. 323 *et seq.*, which requires tribal consent for most rights-of-way across Indian lands. The 1948 Act demonstrated clearly that Congress believed a consent requirement preserved and protected Indian interests (Pet. App. A1, at 559).

ARGUMENT

1. Petitioner argues (Pet. 35-40) that the consent requirement in 25 C.F.R. 169.3(a) was not intended to apply to the 1899 Act and therefore the consent requirement should not have been imposed upon its application. In support of this assertion, petitioner points out that the regulation expressly refers to the 1948 Act as the source of its authority and claims that no tribal consent requirement was imposed until after the 1948 Act. This issue plainly does not warrant review by this Court.

Obviously, as the agency that adopted the regulation, the Department of the Interior is in the best position to determine whether its regulation was intended to apply more broadly than to rights-of-way created under the 1948 Act.

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[3]The court of appeals also rejected the district court's holding that the 1899 Act granted eminent domain power to petitioner. It noted that the 1899 Act lacked the characteristic "take and use" language to describe the railroad's authority under the Act (Pet. App. A1, at 554). The court also rejected petitioner's claim that the Secretary could not lawfully delegate to the Tribe the power to disapprove the right-of-way. The court held that the delegation of the power to disapprove to "a body with independent authority over the affected lands" was permissible (*id.* at 556).

The Department's interpretation of the intended scope of its regulation is entitled to great weight by the courts. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). Moreover, the Secretary's interpretation is fully consistent with the language of Section 169.3(a), which imposes a consent requirement generally. The regulation dealing with railroad rights-of-way, 25 C.F.R. 169.23, expressly subjects such rights-of-way to all pertinent requirements in Part 169, which would include the unlimited consent requirement in Section 169.3(a). There is simply no basis for doubting that the Department intended the regulation to apply to grants under the 1899 Act, and the court of appeals correctly deferred to the Department's interpretation of the regulation as applying to petitioner's application under the 1899 Act.[4]

2a. Petitioner contends (Pet. 40-49) that the tribal consent requirement is inconsistent with the 1899 Act. First, petitioner argues (Pet. 40-42) that the statute granted it the power of eminent domain, which by definition is a taking of property without the owner's consent. In this regard petitioner asserts that the decision below is in conflict with statements in opinions of two other circuits, which "characterized" (Pet. 29) the 1899 Act as an eminent domain statute. The holding by the court below that the 1899 Act is not an

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[4]Petitioner's assertion (Pet. 36) that "no consent regulation existed" until after passage of the 1948 Act is mistaken. Such a requirement was promulgated on May 24, 1938 (3 Fed. Reg. 985), as part of the general regulations governing rights-of-way across Indian lands, 25 C.F.R. Pt. 256 (1939). The regulation provided in pertinent part:

> [Section] *256.83 Consent of allottees or tribe.* • • • Where tribal lands are involved, belonging to a tribe which is organized under the Act of June 18, 1934 [IRA] (48 Stat. 987; 25 U.S.C. 476), all right-of-way applications must be presented to the tribal council or other authorized representative body • • •.

Part 256 expressly covered, inter alia, applications for railroad rights-of-way under the 1899 Act. 25 C.F.R. 256.16 (1939).

eminent domain statute is, however, a correct interpretation of the 1899 Act that conflicts with no decision of any other court and accordingly does not warrant review by this Court.

As the court of appeals noted (Supp. App. A1, at 26 n.2), its holding that the 1899 Act does not grant petitioner the power of eminent domain over tribal lands is contrary to dicta in opinions of two other courts of appeals, which in passing characterized the statute as a condemnation act. See *United States* v. *Ft. Smith & W. R. Co.*, 195 F. 211, 212, 214 (8th Cir. 1912) and *Clarke* v. *Boysen*, 39 F.2d 800, 814 (10th Cir.), cert. denied, 282 U.S. 869 (1930).

Ft. Smith specifically involved the Act of Mar. 3, 1899, ch. 453, 30 Stat. 1368, a special Act passed for the benefit of a particular railroad company on the day after the 1899 Act at issue here was enacted. The case involved only allotted lands, and the only question was whether the Creek Nation was entitled to compensation under the special Act even though no tribal lands had been taken and the allottees had already been compensated. Accordingly, the court's characterization of the 1899 Act as an eminent domain statute was completely unnecessary to the decision.

Similarly, *Clarke* v. *Boysen, supra*, involved lands which were no longer tribal; they had been ceded and opened for settlement and the proceeds of the sale had been set aside for the benefit of the Indians pursuant to the Act of Mar. 3, 1905, ch. 1452, 33 Stat. 1016. While the court did repeat the *Ft. Smith* characterization that the 1899 Act was an eminent domain statute (39 F.2d at 814), its holding that the lands in question remained subject to the 1899 Act's provisions in no way depended on the character of that statute. The decision rested, instead, on the court's conclusion that the ceded and opened lands were, "until location and entry by settlers" (39 F.2d at 814), "lands reserved * * * for other

purposes in connection with the Indian service" under Section 1 of the 1899 Act, 25 U.S.C. 312. There is thus no decisional conflict that requires this Court to decide whether the 1899 Act is an eminent domain statute.

Moreover, the decision below is fully consistent with the language and structure of the statute. The 1899 Act does not authorize a railroad to obtain a right-of-way in the manner characteristically used in an eminent domain statute. It lacks the "take and use" language that this Court has held clearly indicates that eminent domain power has been conferred. See *Noble* v. *Oklahoma City*, 297 U.S. 481, 490 (1936). See also *United States* v. *Ft. Smith & W.R. Co.*, 195 F.2d at 212. Nor does the statute clearly provide a judicial forum for determining just compensation for the condemnation of unallotted lands, which would ordinarily be included in an eminent domain statute. 25 U.S.C. 314 (authorizing the Secretary alone to determine compensation in the case of tribal lands). Finally, there is no hint in the legislative history that Congress intended to confer eminent domain authority on railroads in obtaining rights-of-way. Accordingly, there is no reason for this Court to review the decision below that the 1899 Act did not grant eminent domain power to the railroads.

2b. Petitioner argues alternatively (Pet. 42-48) that a tribal consent requirement is inconsistent with the structure of the 1899 Act, and that the only conditions on the grant that can properly be imposed are those expressly provided in the Act. But this argument ignores the plain language of the statute. Congress expressly required the railroads to comply with the statutory requirements "*and* such rules and regulations as may be prescribed thereunder." 25 U.S.C. 312. Moreover, Congress granted the Secretary power to make "*all needful rules.*" 25 U.S.C. 317 (emphasis added). It is simply impossible to reconcile that language with petitioner's contention that Congress intended to preclude the

Secretary from adopting any requirements in addition to those expressly set out in the statute. As the court of appeals pointed out: "[t]he grant of rulemaking authority in section 1 would be superfluous if it did not confer authority to promulgate requirements, beyond those specified in the Act" (Supp. App. A1, at 553).

Nor does the legislative history support petitioner's claim. As the Ninth Circuit concluded in its earlier *Southern Pacific* decision (543 F.2d at 692), "[t]he 1899 Act was meant to protect fully Indian interests." Petitioner argues that only the statutory conditions to the grant were designed to protect the Indians, but an important part of the 1899 Act was the delegation of rulemaking authority to the Secretary of the Interior and there is no basis for concluding that that provision was not intended to further the pro-Indian purpose of the Act. See H.R. Rep. 1896, 55th Cong., 3d Sess. 2 (1899). It cannot be doubted that the consent requirement is intended to permit the Tribe, which as the beneficial owner of the land has the most at stake, to decide what arrangement best protects its interests. Accordingly, the regulation is consistent with Congress's expressed intention in adopting the 1899 Act.[5]

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[5]The 1899 Act was adopted to end the need for time-consuming special legislation to permit railroads to acquire rights-of-way on tribal lands. Prior to the 1899 Act, Congress, in its special Acts, sometimes included consent requirements and sometimes it did not. See Pet. 55-56 and n.36. The thrust of petitioner's argument here is that Congress in the 1899 Act, which was intended to protect Indians, suddenly decided without explanation to preclude absolutely any future imposition of a requirement for tribal consent, even where the Secretary might find —as Congress itself had found in enacting earlier special legislation —such a condition necessary or desirable for the protection of the Indians. Nothing in the brief legislative history of the 1899 Act supports such a radical change (see Supp. App. A1, at 19-20.

In addition, the reasonableness of the Secretary's interpretation of the 1899 Act is buttressed by Congress's inclusion of a tribal consent requirement — under which petitioner would also be required to secure the Tribe's consent — in the 1948 General Rights-of-Way Act, 25 U.S.C. 324. See also Section 16 of the Indian Reorganization Act, 25 U.S.C. 476. In the absence of a clear legislative statement requiring such a result, it would be anomolous to require tribal consent for all rights-of-way, except those sought by railroads.[6]

3. Petitioner argues (Pet. 48-64) that the delegation of rulemaking authority in the 1899 Act is unconstitutional. This argument is frivolous. It is settled that a congressional delegation of authority to an agency is permissible so long as statutory standards can be inferred against which the agency's action can be judged. See, *e.g.*, *American Trucking Associations Inc.* v. *United States*, 344 U.S. 298, 312-313 (1953); Davis, *Administrative Law Treatise* 160-166 (1978). The 1899 Act satisfies this standard; it allows the railroads to obtain rights-of-way on tribal lands, so long as the Tribe's interests are fully protected. The policy of the Act is clearly expressed and serves to constrain adequately the Secretary's exercise of rulemaking authority. This is hardly

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[6]In light of the unusual posture of this case, review of petitioner's controversy is particularly inappropriate. The decision of the Department not to file the application as submitted does not finally resolve anything. The decision does not mean that petitioner must abandon its railway line; a petition by the Tribe for ejectment is pending in a separate law suit (Pet. 24). Nor indeed is it clear that the decision necessarily precludes petitioner from obtaining a right-of-way under the 1899 Act. Petitioner presumably could still apply and submit evidence of tribal consents apparently obtained prior to 1882 and ask the Secretary to decide that they satisfy the regulation (see *United States* v. *Southern Pacific Transportation Co.*, 543 F.2d at 681). Of course, it would be completely in the Secretary's discretion whether to grant such an application.

a delegation that can seriously be compared to the "delegation running riot" that was declared impermissible by this Court in the cases cited by petitioner. See *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring).

4. Petitioner contends (Pet. 65-72) that granting the Tribe authority to prohibit a right-of-way is an unconstitutional delegation of power to a private entity. But, in fact, the tribal consent requirement is not a delegation at all. Absent any congressional action, the railroads would have to obtain tribal consent before they could build a railway through reservation lands owned by the Tribe, just as they would in order to use any other landowner's property. In addition, the railroad would also be required to obtain Congress's approval for any right-of-way the Tribe approved. See 25 U.S.C. 177. By passing the 1899 Act, which authorizes railroads under certain conditions to acquire rights-of-way on tribal lands, Congress dealt generally with the requirement of *its* consent; the statute is silent regarding the Tribe's consent. Under the Secretary's interpretation, Congress in the 1899 Act chose not to eliminate the requirement that a railroad should reach agreement with the Tribe in order to use the Tribe's land. Declining to withdraw a right the Tribe otherwise would be entitled to exercise is fundamentally different from delegating a power to regulate that would not exist but for Congress's action. Even in the latter case, a delegation of authority to a Tribe is generally permissible because of the sovereign authority of the Tribe, compare *United States* v. *Mazurie*, 419 U.S. 544, 556-557 (1975), but in the former case there is simply no real delegation of power. In any event, it is plain that permitting the Tribe to retain its sovereign authority to decide how its lands should be used is not an impermissible delegation of authority. *United States* v. *Mazurie*, *supra*.

5. Finally, petitioner (Pet. 23, 24-25, 73) and amici[7] argue that the decision below will create a tremendous burden on them because tribal consent will be costly and, in some cases, unattainable. These claims, however, are both greatly exaggerated and presented to the wrong branch of government. First, both INGAA and Transwestern acknowledge that their pipeline rights-of-way are governed by a wholly different statute, the Natural Gas Act, a provision of which, 15 U.S.C. 717f(h), they contend should be interpreted as conferring power on them to condemn tribal lands. Cf. *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99 (1960). Accordingly, their particular concerns may not be affected at all by the decision below. But even assuming their rights-of-way are subject to the tribal consent requirement upheld by the court below, their claim, along with petitioner's and Burlington Northern's, is wholly speculative. There is no substantial evidence to show that the tribal consent requirement has created any undue difficulties for public utilities seeking to obtain rights-of-way across Indian territories. Indeed, experience indicates that the consent requirement has created no real problems. The Secretary of the Interior reported to Congress in 1968 that "[g]enerally, those requiring rights-of-way over tribal lands have encountered no particular problems in obtaining Indian consent. The bargaining process usually produces agreements without unusual difficulties." Staff of the House Comm. on Government Operations, 91st Cong., 1st Sess. (3d Report), *Disposal of Rights in Indian Tribal Lands Without Tribal Consent* 41 (Comm. Print 1969).

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[7]See Motion of Burlington Northern Railroad Company at 4-5; Brief of Interstate Natural Gas Association of American ("INGAA") at 2-3; and Brief of Transwestern Pipeline Company at 2-3, 5-6.

Even if experience with the tribal consent requirement had been less favorable, however, it is clear that Congress, and not this Court, is the appropriate body for remedying such problems. As the House Committee on Government Operations recognized in 1968 in expressing its disapproval of a proposal by the Secretary to eliminate tribal consent for a particular class of Tribes (not one including the Tribe involved here) (H.R. Rep. 91-78, 91st Cong., 1st Sess. (3d Report) 9 (1969); emphasis added):

> If there are frequent instances of Indian tribes unreasonably refusing to consent to the Secretary's granting of rights-of-way over their land which are essential to the fulfillment of public purposes and the public welfare, the *Congress might consider enacting legislation* authorizing the person or agency seeking the right-of-way to institute a suit for condemnation thereof in a federal court.

Since Congress has not seen fit to pass such a statute, there is no reason for this Court to review the decision below in order to pass on the wisdom of having a tribal consent requirement.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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